SANTHA DEVI THURAISINGAM

v.

A. SHANMUGANATHAN

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[ORIGINATING SUMMONS NO. F-796-84]
9 JANUARY 1990

FAMILY LAW: *Maintenance order - Application by wife to examine husband on oath - Alleged default in maintenance payments - Application by husband to rescind maintenance order - Section 95 Law Reform (Marriage and Divorce) Act - Duty of Court - Change in the position of the parties - Assessment of damages - Evidence of affidavits.*

This was an application by the wife requiring the husband to appear and be examined on oath as to his financial position. On 19 May 1987 the Court made an interim order granting the wife the custody care and control of the children. She was also given maintenance orders for the children and herself.

On 10 March 1989 the husband applied to rescind the maintenance order of 19 May 1987 on the ground that there had been a material change in circumstances that would warrant the Court rescinding the order. The wife alleges that the husband had failed to make or tender the maintenance payments for three months.

Held:

[1] In considering an application to vary or rescind, an existing maintenance order, the proper approach is to start from the original order and see what changes financial or otherwise have taken place since that date, including any changes which the Court is required to have regard to under s. 78 of the Law Reform (Marriage & Divorce) Act 1976 as well as any increase or decrease in the means of either of the parties to the marriage and make adjustments roughly in proportion to the changes, if that is possible - *Gisela Gertrud Abe v. Tan Wee Kiat* [1986] 2 MLJ 297.

[2] In granting the original order the learned Judge must have taken into consideration ss. 78 and 92 of the Law Reform (Reform Marriage & Divorce) Act 1976.

[3] On looking at the facts of this case and the whole of the evidence, the wife had succeeded in giving the Court a substantially truthful picture of her financial position which had undergone a change detrimental to her.

[4] There was a change of circumstances in respect of the husband's position from the date of his dismissal by his employer on 28 February 1989. However, the change in the circumstances did not justify any suggestion that the husband is totally incapable of paying maintenance. A proper consideration of the husband's case did not reveal a total inability on the part of the husband to pay maintenance.

[5] On the question of the amount, the Court must bear in mind only the actual income and capital assets at the husband's disposal.

[6] The application of the husband for suspension of the interim maintenance order of 19 May 1987 in so far as it applies to the three children is dismissed. Maintenance order for children varied. Interim maintenance order for wife to be suspended from 1 March 1989. Costs to be paid by husband defendant to wife plaintiff.

[Order accordingly.]

Cases referred to:
Gisela Gertrud Abe v. Tan Wee Kiat [1986] CLJ (Rep) 133
Effe v. Effe [1965] 1 All ER 341
Khoon Chye Hin v. PP [1961] MLJ 105

Legislation referred to:
Law Reform (Marriage & Divorce) Act 1976, ss. 78, 92, 95

For the plaintiff - Nallini Pathmanathan; M/s. Skrine & Co.
For the defendant - Siva Subramaniam; M/s. Siva Ram & Associates

JUDGMENT

Lim Beng Choon J:

On the application of the wife plaintiff ("the wife") a judgment summons was issued on 11 May 1989 (encl. 51) against the husband defendant ("the husband") requiring him to appear and be examined on oath as to his means and also to show cause why he should not be committed to prison for his default in compliance with the order of the Court dated 19 May 1987. The complaints, as appeared in her affidavit in support of her application (encl. 49), of the wife are that the husband has failed to comply with the order of the Court dated 19 May 1987 directing him to pay an interim maintenance of RM1,150 per month for the three children of the family namely Suresh (m), Sunil (m) and Sunita (f). The husband has failed to make or tender the maintenance payments for the months of March, April and May 1989 and he is therefore in arrears in the sum of RM3,450.

Prior to the issue of the judgment summons, the defendant had applied by way of summons-in-chambers dated 10 March 1989 (encl. 45) to rescind the maintenance order of 19 May 1987 on the ground that there had been a material change in circumstance that would warrant the Court to rescind the said order apparently pursuant to s. 95 of the Law Reform (Marriage & Divorce) Act 1976 Act 164 ("the Act 164"). To support his application the husband filed in his affidavit (encl. 46) and the wife also filed in on affidavit to oppose the husband's application (encl. 47). The husband, however, has the final say when he filed in his supplementary affidavit (encl. 57) to rebut the allegations made by the wife.

Before I deal with the two aforesaid matters it is useful to outline the events leading to the presentation of the aforesaid applications.

The parties were married on 14 May 1971. Some time in 1981 marital problem besotted the serenity of the marriage. Matters got worse and on 20 June 1984 the wife left the matrimonial home in Penang with her three children and moved to Kuala Lumpur to reside with her brother who is married and has a family of his own. A petition for divorce was filed by the wife on the grounds of the husband's cruelty and his illicit involvement with another woman. I have been informed by Counsel that the petition is currently in the process of being heard by N.H. Chan J.

Pending the hearing of the divorce petition the wife made an application for custody, care and control of the three children as well as an interim maintenance for the children and herself. An interim order was made by the Court granting her custody, care and control of the children. She was also given a maintenance order granting an interim maintenance of RM1,000 p.m. for the children. The interim maintenance was subsequently increased to RM1,150 p.m. She was also allowed an interim maintenance of RM350 p.m. in respect of herself. Bearing in

mind the advice of the Supreme Court which states that in considering an application to vary or rescind an existing maintenance order, the proper approach is to start from "the original order" and see what changes have taken place, it will be convenient to refer collectively to all orders relating to the maintenance matter pronounced by the Court in this case as 'the original maintenance order'.

Another preliminary matter that I would like to state is that in support of the several applications made by the wife prior to the two present applications which I am required to consider, several affidavits had been filed by both parties in support or in opposition to the said applications in which allegations and counter allegations were freely flung by one party against the other. It serves no useful purpose to set out the contents of these affidavits. I need only touch on some of the relevant averments set out in the said affidavits.

The judgment summons of the wife and the application of the husband to rescind the original maintenance order were heard together with the consent of both Counsel. I should also mention that prior to the hearing, the Counsel for the husband orally applied to amend his application to read that the original maintenance order be suspended instead of it being rescinded. The summons and the said application have been the subject of prolonged hearing in open Court in the course of which the husband and wife have undergone cross examination with great tenacity and unflagging enthusiasm. The oral evidence and the affidavit evidence adduced had given me a fair picture of the case of the plaintiff and that of the defendant.

The husband's case, to put it simply is that because of her conduct the wife does not deserve any maintenance and because of her resources, does not need it. When he passes from attack to defence, he says that although he was quite well-off in the past, he is now a poor man beggared by unemployment, ill-luck, unpaid debts and costs of the divorce and ancillary proceeding. The wife's case, again to put it simply, is that there has been nothing in her conduct to disentitle her to maintenance, that she is in genuine need, living, in the absence of any regular and substantial support from her husband, by utilising the small income derived from the interest she got from her past savings and the generosity of her relatives. She is convinced that her husband is still a man of wealth, and is adepted at concealing his true financial position and determined to stop at nothing to deprive her of maintenance.

It is perhaps not surprising that after a full consideration of the totality of the oral and written evidence presented to me by both sides, I am unable to accept either of these two extreme cases. I propose, therefore to delve deeper into this unhappy story then to state my general finding on the two cases as I found them and then consider in some detail the facts and matters arising therefrom.

Before I proceed to scrutinise the two versions presented by the parties, it is useful to remind myself of the following advice of the Supreme Court (which I have briefly adverted to earlier) in *Gisela Gertrud Abe v. Tan Wee Kiat* [1986] CLJ (Rep) 133 at 137:

> In our opinion, when an application is made to the Court to vary an existing order for maintenance, the proper approach is to start from the original order and see what changes financial or otherwise, have taken place since that that date including any changes which the Court is required to have regard to under s. 78 of the Act **as well as any increase or decrease in the means of either of the parties** to the marriage and make adjustments roughly in proportion to the changes, if that is possible.
> (Emphasis is mine)

I shall start with examining the facts and circumstances on which the original maintenance order was made. In granting the said order the learned Judge must have taken into consideration that it is the duty of a parent to maintain or contribute to the maintenance of his or her children whether they are in his custody or her custody either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and status in life or paying the cost thereof - see s. 92 of Act 164. In considering the maintenance of the wife the learned Judge must also have taken into consideration the matters set out in s. 78 of the said Act which says that in assessing the quantum of maintenance the Court shall base its assessment primarily on the means and needs of the parties regardless of the proportion such maintenance bears to be income of the husband or wife as the case may be.

The factual situation as presented to the learned Judge at the hearing of the application of the wife for the original maintenance order was that the husband had been employed as an executive accountant with Plantation Agencies Sdn. Bhd. for 16 years and his last drawn monthly salary was no less than RM4,778.12 cents. He was also receiving a monthly rental of RM1,200 from the house in Butterworth owned by him which he rented to Shell Co. His financial position improved tremendously some time in 1987 when he took up employment as a financial controller with Teluk Anson Agricultural Enterprises Sdn. Bhd. ('Agricultural Enterprises'). His monthly salary and allowances shot up to RM7,050 and together with the monthly rental from his Butterworth house his total income per month came to RM8,250 The various items of his monthly expenditure were listed in his affidavits in opposition to his wife application (see encls. 12 and 42). The total monthly expenditure showed that he could hardly made ends meet. Besides he claimed that he owed money to several persons and his insurance company amounting to some RM90,000. He also accused his wife of having taken all the proceeds of the sale of the matrimonial house when she left him. The amount received by her was about RM147,000. The wife's answer to this allegation was that the matrimonial home was not a joint property. It was purchased from the dowry contributed by the wife. She was keeping the money received by her as savings for her children. The money was to be utilised for the children's future needs and education. In any case the money would give her some form of assurance against any unexpected contigencies.

It is logical to presume that in making the original maintenance order the learned Judge had fully and carefully considered all the facts presented to him.

I shall now turn to examine whether there is any change of circumstances and if so the extent of such a change that will support the husband's application for the suspension of the original maintenance order directing him to pay the sum of RM1,150 p.m. as maintenance for the three children. The gist of his oral evidence is that since the time when he was dismissed by Agricultural Enterprises on 28 February 1989, his only source of income is the monthly rental of his Butterworth house which is RM1,200 p.m. He is now staying with his brother in Bukit Mertajam and he is not required to pay for his board and lodging. He had, however, taken a car loan before he was dismissed to purchase his Volvo car in 1987 and the monthly repayment instalment is RM1,608. He produces a statement from Public Finance (Exhibit 'P1') to support his assertion. As he is not in a position to pay the monthly instalment with his income of RM1,200 p.m. his brother is generous enough to help him out by lending him a sum of RM800 p.m. After repayment of the monthly instalment he still has a sum of about RM400 for his own use. He says that the monthly loan given to him by his brother is supposed to be repaid as soon as he is able to get employment. Under cross examination, he admits that he also has another car, a Lancia Beta, and he has to spend RM1,084 p.m. to

maintain the two cars. The total amount which he has to spend on the two cars inclusive of the monthly payment toward the car loan is, therefore, RM2,692 p.m. From what he has said, it is quite plain that he has not made a full and frank disclosure of his available resources. A simple calculation will show that if his only resources amount to RM2,000 p.m. (rental of RM1,200 plus his brother's loan of RM800) he must have some other source of income to enable him to pay for his two cars expenses as well as for the assessment and quit rent of his houses and land and other personal sundries expenses. In re-examination he corrected himself after his Counsel had pointed out to him that in his affidavit (encl. 42) he had said that he spent only RM542 p.m. in maintaining his two cars. Even should I accept his correction (which I am not prepared to do so) his evidence relating to his resources remains obscure.

In view of his reluctance to make a proper disclosure of his available resource, I will have to scrutinise his evidence with care and even to draw inference adversed to him if the occasion justifies it - see *Effe v. Effe* [1965] 1 All ER 341 and a local case of *Khoon Chye Hin v. PP* [1961] MLJ 105.

Reverting to the affidavit of the husband, which he put in order to oppose the application of the wife for the original maintenance order, he refrained from mentioning that he had been actively involved in speculating on stock and shares even before his marriage to his wife. This information was wormed out of him when the wife averred in her affidavit (encl. 47) that the husband owned shares of at least six public companies. In his reply to the wife's assertion, the husband admitted he did own shares of five public companies but he had sold all of them except 13,000 shares of RM1 each nominal value of Maika Holdings and these shares were not marketable. But he again refused to say how many shares he owned in respect of each of the remaining companies and when exactly did he sell them. He also failed to reveal to the Court as to what happened to the monies which he received from the sale of the shares. However in his oral evidence he says that he sold his shares to pay towards the purchase price of his Butterworth house which he bought in 1975 and his Penang house bought in 1983. But he could not have sold all his shares to purchase the two houses for as he said later in his evidence that he had also sold his shares in 1985 to repay a bank overdraft of RM60,000. Upon a careful scrutiny of his evidence about his transactions in stock and shares I must say again that he has not been eager to make to this Court a full and frank disclosure of his assets. Furthermore with his knowledge and experience in accountancy and financial matters (he was accounts executive of Plantation Agencies before he became manager of finance of Agricultural Enterprise) he is no doubt astute in his dealing with stock and shares. When one examines the documents produced by him to support his case, it becomes evident that he elects to produce only those documents directed to show some of his monthly expenditures. He has not produced a single document to show his local bank account or savings account. Another telling point is that when the wife claims that he is in possession of a Master Credit Card, a Visa Clasic Card and an American Express Card, he produced only the first two cards which show limited use, and he has astutely refrain from mentioning anything about the American Express Card let alone producing it for the perusal of the Court.

Another point worth mentioning is that the husband appears to be quite perceptive in his dealings in real estate. His Butterworth house is rented out to Shell Co. at RM1,200 p.m. To be able to fetch a rental of that amount the Butterworth house must be worth quite a price. Turning to his Penang house, he could have rented it out to someone if he is, as he said, in desperate need of money. No reason has been given as to why he prefers not to rent out the Penang house.

In any event the husband's present lifestyle appears to me to have not been changed. He still can afford to own two cars. When asked as to why he still keeps two cars, his reply is that he intends to keep the Volvo for his own use and in any case he would need that car should he find employment in the future. His statement is, to say the least, highly incredible. It is extraordinary that he would prefer to keep an expensive car the maintenance of which would be inevitably on the high side and which he could ill-afford had there been a drastic change in the circumstances of his case. As regards to the Lancia Beta he says that he has more or less arranged to sell it to his brother when the road tax expired on 31 July 1989. Bearing in mind that the Lancia Beta is according to the husband, worth RM5,000 it is incredible that his brother would not have bought it much earlier instead of lending the husband RM800 a month for some 4 months (from March to July 1989). To my mind the truth of the matter is that the husband prefers to keep the two cars in order to maintain a lifestyle which he used to enjoy when he was working with the Agricultural enterprise as he can still afford to maintain such lifestyle. It has also been suggested that since he had bought the Volvo car at a cheap price of RM61,500 in 1987 and since recently the prices of cars have soared up it would be difficult for the husband to buy a similar type of car at the value at which he purchased it in 1987. In considering any change in the financial circumstances of the husband such a tongue in the cheek statement is best mentioned and be ignored.

Finally it is to be noted that at least from the year 1984 until he joined agricultural enterprise, the husband's monthly earning has never been less than RM4,778. When he took up employment with the said enterprise his monthly earning had gone up to over RM8,000. This is supported by his oral evidence where he said that for the year 1988 he had to pay RM21,581.10 as his income tax for that year. Unless he is a spendthrift and wasteful with his monies (and he says he is not) one can hardly imagine that he would not have saved quite a substantial sum. Furthermore being a highly qualified and experienced accountant, I cannot imagine that he will not be able to get employment. From his evidence I am convinced that he is reluctant to do so simply because he is using the opportunity of his dismissal to support his application to suspend the maintenance order. He can afford to live quite comfortably without working. Be that as it may my task here is to assess whether there has been any material change in the circumstances affecting his ability to pay maintenance on the basis that the evidence substantially, and without over much distortion reflects his true present position. An examination on this point will be made later.

I now pass to a consideration of the wife and her case. Counsel for the husband argued that the wife must have resources at her command to enable her to meet her constantly recurring expenses and that she is deliberately concealing these resources from the Court. A great part of his cross-examination was directed to the proceeds of the sale of the matrimonial home of which a sum of RM147,000 was said to have been kept by her and to show that with the existence of such large sum of money she could easily maintain herself and her three children. Now this evidence regarding the wife having received the money from the sale of the matrimonial home had been adduced at the trial of the earlier maintenance proceeding and the trial Judge must have taken the evidence into full consideration. Despite having heard the evidence on this matter the trial Judge had thought it fair and just to grant the wife the original maintenance order directing the husband to pay a sum of RM1,150 p.m. as interim maintenance for the three children and a further sum of RM350 p.m. to the wife. However that may be I think to be fair to both parties that I should take this matter into consideration once again when I am enjoined by law to consider all the matters as set out in s. 92 of the Act 164. I have not been asked to decide on who had the right over the

matrimonial home or on the proper division of the matrimonial home. As such I do not think I should deal with this issue particularly when the only issue I have to decide is on the issue of interim maintenance order.

The wife has said that she received the cheque for the sum of RM140,192 being the proceeds of the sale of the matrimonial house from her lawyer (after the deduction of legal fees and charge) only on 28 May 1985. It is to be noted that she left the matrimonial home in Penang to move to Kuala Lumpur where her relatives are residing on 24 June 1984 that is to say one year before she received the said cheque. When she left Penang with her children she had little money with her. All her jewelleries had been taken by her husband or her husband's father. She had through her lawyer demanded the return of the jewelleries from her husband but her demand was ignored. Soon after her arrival in Kuala Lumpur she had to find a place to live and to set up a new home; she could not stay with her brother indefinitely as he has a family of his own. She succeeded in finding a relatively small house which she had to pay a moderate rental of RM550 p.m. She had to refurnish the house in a manner which might not be similar to but at least suitable to the standard of living enjoyed by her and the three children before the breakdown of the marriage. At that time she had not obtained a single cent from the husband. She had to pay the rent, household expenses as well as food, clothings, medical and educational fees and transportation charges for her children. Besides these expenses she had to pay her legal fees relating to the matrimonial and maintenance proceedings. It was only on 13 November 1984 - after a lapse of 5 months - that she succeeded in serving the original maintenance order on the husband. By that time she must have drawn from her capital assets to pay for all expenses referred to earlier. I therefore have no reason to refuse to accept her evidence that she had to dig into the capital assets of RM140,000 for the extra expenses and what she is now left with is RM80,000 of which she is earning interest in the sum of RM511 p.m. She has moreover produced three receipts to substantiate her monthly interest which she is receiving from her capital asset of RM80,000 (see Exhibits D3AC). This sum of RM511 p.m. is not sufficient even to pay for the monthly house rent. On looking at the whole of the evidence I am left with the view that the wife has succeeded in giving the Court a substantial truthful picture of the hard times she has endured and of the means she has employed to keep her head above water. Her financial position has undergone a change which is detrimental to her. The wife is now 47 years of age and her chance of remarriage is slim. Her three children are:

(i) Suresh s/o Shamugam and Sunil s/o Shamugam are twins and they were born on 23 January 1978. They are 11 years old now.

(ii) Sunita d/o Shamugam who is 9 years plus having been born on 5 August 1980.

In the ultimate analysis, my conclusion is that there is a change of circumstances in respect of the husband's position from the date of his dismissal by his employer Agricultural Enterprises on 28 February 1989. However the change in the circumstances does not to my mind justify any suggestion that the husband is totally incapable to pay maintenance. A proper consideration of the husband's case does not reveal a total inability on the part of the husband to pay maintenance. His refusal to pay maintenance is not due to his inability to do so but rather from his deliberate refusal to do so simply because he was and still is under the impression that the wife does not deserve maintenance and because she has the resources to maintain herself and the three children. Indeed he admits in his evidence that he is prepared to pay even up to RM400 p.m. for the maintenance of the children. If need be he would go to the extent of borrowing money to maintain them and to pay whatever arrears.

But he is persistent in saying that as the wife has substantial sum which she is able to spend for the time being to see to the childrens' need there is no need for his wife to ask any money from him. For these reasons the application of the husband for suspension of the maintenance order of 19 May 1987 insofar as it applies to the interim maintenance of the three children is dismissed.

On the question of amount I must bear in mind only the actual income and capital assets which are at his disposal. I should not take into account his stock and shares transactions or the possibility of his renting out his Penang house since there is no evidence of the value of such transactions. He is clearly in receipt of RM1,200 p.m. as rental for his Butterworth house. He owns a Volvo which he says was worth about RM72,000 plus in 1987 and which through his Counsel he says is now worth even more than RM72,000. I think a sum of RM75,000 is a fair price for this Volvo. The second car of his is worth RM5,000. Taking in consideration all these I shall vary the maintenance order by directing him to pay an interim maintenance of RM600 to the three children with effect from 1 April 1989 until the children attain the age of 18 years or until further order of the Court which ever comes first. As the husband is in arrears from 1 March 1989 to 1 January 1990 amounting to RM6,000 he is further directed to pay the arrears within one month from the date of this order. As regard to interim maintenance for the wife, I think it is fair in the circumstances of the case to suspend the order with effect from 1 March 1989. There will be general liberty to both parties to apply.

The costs of these proceedings are to be paid by the husband defendant to the wife plaintiff.

Also found at [1990] 1 CLJ 988